

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

FRATERNAL ORDER OF POLICE,)	
LODGE NO. 10,)	
)	
Charging Party,)	
)	
v.)	<u>ULP No. 07-02-558</u>
)	Probable Cause Determination
STATE OF DELAWARE,)	
DEPARTMENT OF CORRECTION,)	
)	
Respondent.)	

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of §1302(0) of the Public Employment Relations Act 19 Del. C. Chapter 13 (1994). The Department of Correction (“DOC”) is an agency of the State.

Fraternal Order of Police (“FOP”) is an employee organization which admits to membership public employees and which has as a purpose the representation of such employees in collective bargaining pursuant to 19 Del.C. §1302(i). The FOP, by and through its Lodge No. 10, represents a bargaining unit of all Probation/Parole Officers and Senior Probation/Parole Officers employed by the DOC as defined in DOL Case No.

165 for the purpose of collective bargaining and is certified as the exclusive representative of that unit. 19 Del.C. §1302(j).

FOP Lodge 10 and the Department of Correction were parties to a series of collective bargaining agreements the most recent of which had a term of June 19, 2002, though June 18, 2005. By letter dated September 6, 2004, and reiterated by letter on December 13, 2005, FOP Lodge No. 10 notified the State “of its desire to terminate, modify or amend the CBA.”

On or about February 21, 2007, the FOP filed an unfair labor practice charge alleging the State violated 19 Del.C. §1307(a)(2), (3), (5) and/or (6), which provide:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (2) Dominate, interfere with or assist in the formation, existence or the administration of any labor organization.
 - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
 - (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

The Complaint sets forth conduct by the parties during the on-going contract negotiations relating to proposals and counter-proposals concerning Article 9, Vacancies, of the collective bargaining agreement. The charge alleges:

On or about February 12, 2007, Kent County Regional Manager Ken Brandon of Respondent DelDOC, approached two Probation and Parole Officers working Level II and requested that they volunteer to supervise Level III case loads; upon information and belief, Regional Manager Brandon also has one Probation and Parole officer working a split Level II/III case load. (Complaint ¶11)

It is this conduct which is the basis of the alleged violations of the PERA, as set forth in ¶12 of the Complaint.

The State filed its Answer on or about March 9, 2007, and an Amended Answer on or about March 15, 2007, in which it denied the allegations set forth in the Complaint, specifically:

The State denies the allegations set forth in paragraph 11, and further states that Respondent acted appropriately and in compliance with the Collective Bargaining Agreement in how it has posted positions and filled resulting vacancies. In addition, the State denies that anyone was moved from a Level 2 position to a Level 3 position in violation of the Agreement.

The State denied that it committed the specific violations of the PERA.

Under New Matter I of the Answer, the State alleged in ¶¶ 16 - 18:

16) The arbitration clause in the collective bargaining agreement clearly encompasses the dispute at issue in this case;

17) the State is willing to resolve the dispute through arbitration;

18) the dispute well-suited to resolution through arbitration.

Under New Matter II of its Answer, the State alleges that the underlying events giving rise to the alleged violations of the PERA occurred more than 180 days before the charge was filed; consequently, the unfair labor practice charge is untimely and must be dismissed.

In its Reply to New Matter filed on or about March 20, 2007, Charging Party disputes that the current dispute qualifies as a proper subject for deferral to the contractual arbitration process and that the unfair labor practice charge is untimely.

DISCUSSION

Concerning the State's New Matter I, the PERB has adopted a limited discretionary policy of deferring an unfair labor practice charge to the contractual arbitration process where several factors are present. One of those factors is that the resolution of the unfair labor practice charge turns on the interpretation of specific contract language. Red Clay Ed. Assn., DSEA/NEA v. Bd. of Ed. Del. PERB, AULP No. 90-08-052A, I PERB 607 (1991). For this reason, application of the deferral policy involves primarily unfair labor practice charges alleging a per se violation of the statute resulting from a unilateral change in the status quo of a mandatory subject of bargaining. Sussex Country Vo-Tech Teachers Assn. and Jo-Ann Atkinson v. Sussex County Vo-Tech School District, Del. PERB, ULP No. 96-07-183, II PERB 1481, 1485 (1996). In such cases determining the status quo is primarily a function of the collective bargaining agreement. Thus, in order to justify deferral to arbitration it is necessary that the issue

raised by the unfair labor practice charge requires the interpretation of the parties' collective bargaining agreement. FOP, Lodge No. 1 v. City of Wilmington, Del. PERB, ULP 89-08-040, I Del. PERB 449, 453 (1989). Such is not the case here. The issue raised by this Petitioner is exclusively one of statute. Seaford Ed. Assn. v. Bd. of Ed., Del. PERB, ULP No. 87-10-018, I PERB 233, 236 (1988).

As a defense to the unfair labor practice charge Respondent is free to present evidence and argue that it acted pursuant to a specific provision of an existing collective bargaining agreement. Even if successful, this would not justify deferral since the PERB has been previously determined that interpreting contract language may be periodically required in order for the PERB to resolve an unfair labor practice properly before it. Christina Ed. Assn. v. B. of Ed., Del. PERB, ULP No. 88-09-026, I PERB 359, 366 (1988).

Respondent's allegation that the charge is untimely is denied by Charging Party. The pleadings provide an insufficient basis for resolving this issue. As with the deferral issue, Respondent is free to present evidence and argument in support of its position during the unfair labor practice proceeding.

DETERMINATION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive

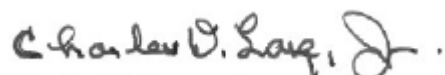
Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

(b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

Considered in a light most favorable to the Charging Party, the pleadings constitute reasonable cause to believe that an unfair labor practice may have occurred. Specifically, the issue is whether the conduct set forth in ¶ 11 of the Complaint considered within the context of the ongoing contract negotiations violated 19 Del.C. §1307(a)(2), (a)(3), (a)(5) and (a)(6), as alleged.

The pleadings raise both factual and legal questions which must be resolved based upon a factual record. Dates will be promptly offered for the purpose of scheduling a hearing at which the parties can present evidence and argument in support of their respective positions.

DATE: April 27, 2007



Charles D. Long, Jr.,
Executive Director
Del. Public Employment Relations Bd.